Filed 2/3/05 P. v. Renteria CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL RENTERIA,

Defendant and Appellant.

F043462

(Super. Ct. No. 74577)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, John G. McLean and Barbara J. Moore, Deputy Attorneys General, for Plaintiff and Respondent.

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FACTUAL AND PROCEDURAL BACKGROUND

At about 9:45 one morning in Tulare, 17-year-old Yvette Contreras was asleep in her bedroom when her mother, Christina Baca, answered a telephone call from a person

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who identified himself as Manuel. Baca recognized the caller's voice as that of a person who had called and talked with her daughter for the past four years and whom her daughter considered a friend. Before leaving for work a few minutes later, Baca talked with her daughter but did not mention Manuel's call. She never spoke with her daughter again.

At about 10:00 that morning, Manuel Rentería used the telephone at the home of Anna Corp, the mother of his friend and next-door neighbor Bryan Urbina.[1] At trial she testified she did not recall what Manuel wore, but Detective Frank Arnold testified she told him he wore a red shirt. Although she could not be sure because of difficulty with her vision, she testified a person she thought was Manuel left in a white car that pulled up in front of the Rentería home. Arnold testified she told him Manuel looked out the window of her home, told her he was waiting for a ride, and then walked toward a white car parked in front of the Rentería home. She testified the white car was similar to the car in a photograph of Yvette's car.

At about 3:30 that afternoon, Waylon Dowdy went fishing after work at a little bayou where he had fished every day for the past 20 years. No one else was there. He heard no gunshots or any other sounds. On his way out about an hour later, driving east instead of west into the glare of the sun, he saw a "pretty good size puddle of blood." He started looking around and found a long and "really bloody" strand of hair and a "pretty good size piece of … skull" on the ground and a piece of brain in the water. He left the piece of brain in the water but took the hair and the piece of skull with him to show to a detective whom he later led to the bayou. Pieces of brain, hair of the same dye color as Yvette's, and a shotgun shell were recovered there.

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[1] Since Manuel Rentería and his brother Ramón share the same surname, for brevity, clarity, and consistency all references to the youthful members of the cast of characters here will be initially by both names and subsequently by first names.

At about 4:20 that afternoon, Baca returned home to find Yvette gone. Her car was missing, as were her driver's license, birth certificate, bankcard, and Social Security card, and her room was not as tidy as usual, suggesting she had just gotten out of bed and taken off. Right before midnight, Baca filed a missing person's report with the police. Manuel spent that night at the home of his brother Ramón's girlfriend in Porterville.

On the day after Yvette disappeared, Manuel's former girlfriend, Rocío Macias, who pled no contest to accessory to a felony, twice went to Yvette's home hoping to find him.[2] Yvette had told Baca that Rocío did not like her and that she and Rocío had had conflicts before. For months, Yvette had told Baca she was afraid to be alone because she thought something was going to happen to her. Because of rumors Yvette spread about her, Rocío testified she wanted to get her hands on Yvette and beat her up. She thought Manuel and Yvette were seeing each other. Manuel and Rocío argued about his relationship with Yvette, but Rocío still loved him.

Later that afternoon, Detective Robin Skiles interviewed Rocío. Afterward, Rocío went to the Rentería home, where Manuel, Ramón, and their mother all lived, and drove Ramón, who was worried about Manuel, to Porterville to pick him up. She drove Manuel and Ramón back to Tulare, dropped Ramón off at the Rentería home, and drove Manuel to Corcoran, as he had asked.

On the way to Corcoran, Manuel and Rocío affirmed their love for each other. She told him a detective told her Yvette had disappeared, somebody had been shot, and both he and she were possible suspects in Yvette's homicide, but he said nothing. She "kept pushing the subject," so he started to agree with everything she said, which she thought was his way of telling her to shut up. Speaking as if to pacify her, he said, "Okay. Yeah. I shot her, yeah. Is that what you want to hear?" He said, "Somebody got

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[2] Rocío testified at Manuel's preliminary hearing, but at both of his trials, after she invoked the Fifth Amendment and the court found her unavailable as a witness, her testimony from his preliminary hearing was read to the jury.

shot. The whole – the face got blown off. Is that what you want to hear? Does that make you happy? I shot her. There. Are you happy? Will you shut up already?" He said he shot Yvette, burned his clothing, and left the gun "back over there." He said he "will never forget that face."

Shortly after midnight on the next day, Arnold went to the Rentería home and asked Ramón about a gun. Ramón said he kept a single-barrel pump-action 12-gauge sawed-off shotgun and some rounds in his bedroom but noticed the weapon was missing when he came home from work on the day after Yvette disappeared. He said he was a felon who was not allowed to have guns. A few hours later, the police arrested Manuel at the home of friends in Corcoran. Not long afterward, Yvette's white car was found in Porterville. Blood, brain, and hair were on the outside of the car. Her body was inside the trunk. A pathologist testified the cause of her death was a close contact front-to-back shotgun wound to the left face region.

Detective Mario Martin, who transported Manuel from the scene of his arrest in Corcoran, chose "basically the shortest route" to the violent crimes office in Visalia. Manuel asked him why he was being arrested. Martin said, without *Miranda*[3] warnings, "You know why you're being arrested." Manuel paused a few seconds and uttered an expletive. Martin said, "You know who the victim is." Manuel said, "Yeah, Yvette." He asked, "Are we going to drive by the crime scene?" As Martin drove down a road near the crime scene, he saw Manuel turn and look in that direction.

That evening, responding to an anonymous tip about Yvette's disappearance, Arnold found a bag of bloody and burnt clothing on top of a mound of dirt in an orange grove in Terra Bella. Bryan testified a red shirt and a gray jersey from the bag looked like his friend and next-door-neighbor Manuel's. Inside the bag was a bloodstained and

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436, explained by and followed by *Dickerson v. United States* (2000) 530 U.S. 428, 431-432.

partially burnt pair of blue pants whose measurements were nearly identical to those of a pair of blue pants Manuel's and Ramón's mother testified both her sons used to wear and whose DNA bloodstain profile a criminalist testified was consistent with Yvette's. Also inside the bag was a pair of partially burnt black shoes of the same brand as the pair that Bryan saw Manuel with and that Manuel said he bought with his last paycheck.

José Velasco, an inmate serving time for murder, met Manuel in county jail, where Manuel told him he was there for killing a girl named Yvette. Manuel said Yvette picked him up in her car and drove him out to the country, where he got out a sawed-off shotgun after he told her to get out of the car and face away from him. Although she cried and begged for her life, which he thought was funny, he shot her in the back of the head, knocking some brain and skull onto the car, and threw her into the trunk. A day or two later, his girlfriend and his brother followed him to Porterville and Terra Bella so he could dump Yvette's car in one city and his clothes in the other and get a ride to Corcoran, where he hid out. Velasco admitted he went to the police to try to get a deal and told Skiles he was willing to lie on the stand to do so. He admitted he read about Manuel's case in local newspapers and speculated about some of the things he told Skiles. He did not get a deal.

Velasco asked Gerald Martinho, another inmate who met Manuel and Velasco in county jail, to "go along with a story" about Manuel so he could get a deal in a murder charge he faced. Martinho did not help Velasco. Martinho had two felony crime-of-moral-turpitude priors and one felony crime-of-violence prior.

At Manuel's first trial, the court declared a mistrial after the jury hung. At his second trial, a jury found him guilty of first degree murder and found he personally and intentionally discharged a firearm proximately causing great bodily injury or death. (§§ 187, subd. (a), 12022.53, subd. (d).[4])

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[4] All statutory references not otherwise noted are to the Penal Code.

DISCUSSION

1. Ramón's Statements about the Missing Shotgun

Manuel argues that Ramón's out-of-court statements about the missing shotgun were not admissions against Ramón's penal interest, that the prosecution failed to show due diligence to locate Ramón, and that the admission of Ramón's statements at trial violated Manuel's federal constitutional right of confrontation. The Attorney General argues that there was no error and that error, if any, was harmless. In this part of the discussion, we will address only Manuel's admission-against-penal-interest and confrontation-clause arguments. Later, we will address the other arguments and the issue of prejudice. (See part 4, *post,* pp. 11-14.)

At Manuel's preliminary hearing, the court ordered Ramón to testify after the prosecutor offered him use immunity, but he refused, saying, "I just don't want to be a part of these proceedings," and the court held him in contempt. At that time, Ramón was serving a prison sentence on a guilty plea to accessory to a felony. Ramón did not testify at either of Manuel's trials.

At Manuel's first trial, the court granted his motion in limine to prohibit the admission of Ramón's statements about the shotgun. At his second trial, the prosecutor made a motion in limine to admit those statements as declarations against Ramón's penal interest. At the hearing on the prosecutor's motion, Arnold testified he "told [Ramón] upfront" that he was not a suspect and that the sheriff's office only wanted to locate Manuel. In reply to questioning, Ramón admitted that as a convicted felon he was not allowed to possess a firearm but that he nonetheless kept a single-barrel pump-action 12-gauge sawed-off shotgun and several live rounds in his bedroom. He told Arnold he knew Manuel had taken the shotgun and the rounds that were missing from his bedroom when he returned home from work on the day Yvette disappeared. Arnold acknowledged that Ramón's statements could not be used against him.

Finding Ramón's statements probative as statements against his penal interest, the court granted the prosecutor's motion at Manuel's second trial. The court's ruling allowed her to adduce evidence that Ramón noticed the shotgun he kept in his bedroom was missing when he came home from work on the day after Yvette disappeared. Since Manuel and Ramón lived together, the inference at once arises that Manuel took the likely murder weapon from his brother's bedroom.

Contrary to the Attorney General's argument, Ramón's statements were not admissions against his penal interest. (See Evid. Code, § 1230 ["Evidence of a statement … is not made inadmissible by the hearsay rule if … the statement, when made, … so far subjected [the declarant] to the risk of … criminal liability, … that a reasonable [person] in his [or her] position would not have made the statement unless he [or she] believed it to be true."].) Before Ramón made those statements, Arnold "told him upfront" that he was not a suspect and that the sheriff's office only wanted to locate Manuel. On those facts, Ramón's statements fell outside the scope of Evidence Code section 1230. Even if his statements were admissions against *Manuel's* penal interest, they were not admissions against *Ramón's* penal interest. (See *Williamson v. United States* (1994) 512 U.S. 594, 596-604; *People v. Phillips* (2000) 22 Cal.4th 226, 237; *People v. Shipe* (1975) 49 Cal.App.3d 343, 354.) The court erred in ruling to the contrary.

With reference to Manuel's federal constitutional argument, the "core class of 'testimonial' statements" on which the confrontation clause focuses includes "'pretrial statements that declarants would reasonably expect to be used prosecutorially'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford v. Washington* (2004) 541 U.S. 36, __ [158 L.Ed.2d 177, 192-193; 124 S.Ct. 1354, 1363-1364] (*Crawford*).) Ramón made his statements about Manuel and the shotgun in response to questioning by a homicide detective who arrived at the Rentería

home shortly after midnight in search of information about a murder weapon and a murder suspect. As those statements fall squarely within the scope of that core class, the court's ruling violated Manuel's federal constitutional right to confrontation.

2. Manuel's Custodial Statements and Conduct about the Victim's Identity and the Crime Scene Location

On the premise that his custodial statements and conduct without *Miranda* warnings showing his knowledge of the victim's identity and of the crime scene location were the result of the functional equivalent of questioning, Manuel argues that the use of that evidence at trial violated his federal constitutional right against self-incrimination. The Attorney General argues there was no error. The parties do not dispute the absence of *Miranda* warnings. In this part of the discussion, we will address Manuel's self-incrimination argument. Later, we will address the issue of prejudice. (See part 4, *post,* pp. 11-14.)

At Manuel's first trial, the sole witness at his motion to prohibit the admission of that evidence was the detective, Mario Martin, who heard his statements and observed his conduct while driving him from the site of his arrest to the sheriff's office. After Manuel asked, "[W]hy am I being arrested?" Martin told him, "[Y]ou know why you are being arrested." After Manuel uttered an expletive, Martin told him he was being arrested for a homicide and he knew who the victim was. Manuel "hung his head down and said yeah, Yvette." He asked Martin if they were going to drive by the crime scene. Without replying, Martin drove on the road next to the crime scene and saw Manuel look in that direction. Finding "the officer's response to the defendant's questions were [*sic*] certainly on an objective level calculated or likely to elicit incriminating statements" and analogizing the case to "actual cases on [*sic*] which the officer drove the defendant by a crime scene in order to obtain a – see what the defendant's reaction was," the court granted the motion.

At Manuel's second trial, the court characterized its own earlier ruling as "ill considered" and held an evidentiary hearing at which Martin was again the sole witness. Martin testified he thought Manuel had already been told why he was being arrested, so after Manuel asked him why he told him he knew why. After Manuel uttered an expletive, Martin told him "he even knew who the victim was." Manuel responded, "[Y]eah, Yvette," admitted he knew the location of the crime scene, and asked Martin if they were going to drive by there. Martin did not reply, but as he neared the crime scene on his way to the violent crimes office he saw Manuel turn around and look in that direction. Finding Manuel's statements and conduct "probative and not the product of an interrogation," the court granted the prosecutor's motion.

The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 (*Innis*).) "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Id.* at p. 301.) Focusing "primarily upon the perceptions of the suspect, rather than the intent of the police," we conclude Martin's words had nothing to do with attending to Manuel's arrest and custody but had everything to do with eliciting an incriminating response from him. (*Ibid.*)

The focus of the law on Manuel's perceptions "reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (*Innis, supra,* at p. 301.) A "forbidden … 'interrogation'" includes both direct questioning and its 'functional equivalent.'" (*Ibid.; People v. Boyer* (1989) 48 Cal.3d 247, 273, disapproved on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn.1.) Even if Martin "had no conscious purpose to

entice defendant into further discussion (though we can discern no other), he should have realized under all the circumstances that this was a likely result." (*People v. Boyer, supra,* at p. 275.) The court's ruling that Manuel's custodial statements and conduct without *Miranda* warnings were "not the product of an interrogation" violated his federal constitutional right against self-incrimination.

3. Hair Comparison Evidence

Manuel argues the admission of hair comparison evidence without a hearing to determine the acceptance of that analysis in the relevant scientific community violated his federal constitutional rights to due process and a fair trial. The Attorney General argues there was no error.

Before trial, Manuel made an in limine motion objecting to the admission of hair comparison evidence without a *Kelly/Frye*[5] hearing, but the court denied his motion. At trial, a Department of Justice generalist with over a decade of trace evidence experience testified that she examined reference hairs from Manuel, Rocío, and Yvette and found that hairs in Yvette's right hand, inside her car, and inside the bag of bloody and burnt clothing were similar to Yvette's reference head hairs, that hairs on a white sock and on the pair of pants inside the bag were similar to Manuel's reference pubic hairs, and that one hair from the autopsy table was similar to Manuel's reference head hairs. A finding of similarity does not mean the hairs came from a specific person.

In sole reliance on *Williamson v. Reynolds* (E.D. Okla. 1995) 904 F.Supp. 1529, affirmed in part and reversed in part by *Williamson v. Ward* (10th Cir. 1997) 110 F.3d 1508, 1522-1523, and abrogated on another ground by *Nguyen v. Reynolds* (10th Cir. 1997) 131 F.3d 1340, 1353-1354, Manuel argues that "hair comparison evidence has been found to be inadmissible under the federal rules of evidence." (*Williamson v.*

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[5] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013.

Reynolds, supra, 904 F.Supp. at pp. 1554-1558.) The Tenth Circuit Court of Appeals reversed the hair analysis ruling in that case, however, on the ground that the district court erroneously applied the *Daubert*[6] evidentiary standard rather than a due process/fundamental fairness standard in a federal habeas corpus challenge to a state court evidentiary issue. (*Williamson v. Ward, supra,* 110 F.3d at pp. 1522-1523.) By citing no other authority in support of that argument, Manuel fails to raise a proper claim on appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 266.)

Manuel argues that a recent study establishing on the basis of mitochondrial DNA sequencing that hair comparison analysis has a high percentage of false positives shows the error of not holding a *Kelly/Frye* hearing on the hair comparison evidence. (Houck & Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons* (2002) 47 J. Forensic Sci. 964.) A decade before that study, however, the Supreme Court noted that since "[h]air comparison evidence that identifies a suspect or victim as a possible donor has been routinely admitted in California for many years without any suggestion that it is unreliable under *Kelly/Frye*" a challenge to a criminalist's hair comparison evidence is "anomalous." (*People v. Pride* (1992) 3 Cal.4th 195, 239.) As an article from a scientific journal does not negate a Supreme Court decision, the doctrine of stare decisis compels us to reject Manuel's argument. (See *In re Englebrecht* (1998) 67 Cal.App.4th 486, 495, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Beckman v. Mayhew* (1974) 49 Cal.App.3d 529, 535.)

4. Cumulative Prejudice

The harmless error standard of review applies to the erroneous admission of the evidence of Ramón's statements about the shotgun in violation of Manuel's federal constitutional right to confrontation. (*People v. Song* (2004) 124 Cal.App.4th 973, 982, citing *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140, criticized on another ground by

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[6] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.

Crawford, supra, 541 U.S. at p. ___ [158 L.Ed.2d at pp. 200-201; 124 S.Ct. at pp. 1371-1372].) "Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb* (1794) 2 N.C. 103 (per curiam), decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: '[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.' (*Id.* at p. 104.)" (*Crawford, supra,* 541 U.S. at p. __ [158 L.Ed.2d at p. 191; 124 S.Ct. at p. 1363].) Here, the court's federal confrontation clause error brought before the jury the only evidence that Ramón noticed the shotgun he kept in his bedroom was missing when he came home from work on the day after Yvette disappeared. Since Ramón and Manuel lived together, the jury could readily infer Manuel killed Yvette with the missing shotgun.

Likewise, the harmless error standard of review applies to the erroneous admission of the evidence of Manuel's custodial statements and conduct in violation of his federal constitutional right against self-incrimination. (*People v. Sims* (1993) 5 Cal.4th 405, 447, overruled on another ground by *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309.) "'To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," [citation], to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.'" (*People v. Cahill* (1993) 5 Cal.4th 478, 516, quoting *Miranda, supra,* at p. 460.) Here, the court's federal self-incrimination clause error brought before the jury -- in incomparably probative words from the accused's own mouth and motions of the accused's own body -- the only evidence that

immediately after his arrest Manuel knew not only the victim's identity but also the crime scene location.

Our duty under the harmless error standard of review is to reverse the judgment unless we can conclude the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) An earlier United States Supreme Court case articulates the fundamental question in the harmless error standard of review as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) More recently, the high court formulated the inquiry as "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this trial* was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Apart from Ramón's statements about the shotgun in his bedroom and Manuel's custodial statements and conduct about the victim's identity and the crime scene location, the other evidence of Manuel's guilt was less compelling. He made damaging admissions to Rocío, but her credibility was suspect. She was Yvette's rival, so her motive to kill Yvette arguably was even stronger than Manuel's. She pled no contest to accessory to a felony after the sheriff's office identified her as a possible suspect in Yvette's homicide. She faced a maximum of three years in state prison on the plea, but her sentence was "still up in the air" and local time or probation was still possible. She was predisposed to maximize Manuel's role in Yvette's murder and to minimize her own.

Even if the jury somehow were to find Rocío credible, the disembodied reading to the jury of her preliminary hearing testimony showed that Manuel's statements to her were somewhat equivocal, as she thought he was telling her things just to pacify her and to get her to shut up. The preliminary hearing transcript of her testimony betrayed not only her fear of Manuel's and Yvette's relationship but also her longing to harm Yvette.

Velasco's testimony about Manuel's jailhouse statements was similarly suspect. He testified Manuel told him he shot Yvette in the back of the head after telling her to face away from him, but the pathologist identified the cause of death as a front-to-back shotgun wound. Velasco admitted reading about Manuel's case in local newspapers, telling the detective he was willing to lie on the stand, and speculating about some of the things he told the detective.

In assessing prejudice, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) We cannot declare the cumulative prejudice of the court's federal constitutional errors harmless beyond a reasonable doubt. (See *People v. Holt* (1984) 37 Cal.3d 436, 459, disapproved on another ground by *People v. Mickey* (1991) 54 Cal.3d 612, 656, as stated in *People v. Triplett* (1993) 16 Cal.App.4th 624, 627.)[7]

DISPOSITION

The judgment is reversed and a new trial ordered. (Pen. Code, § 1262.)

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Gomes, J.

I CONCUR:

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Dawson, J.

[7] Our holding moots Manuel's due diligence argument about the admission of Ramón's statements and his due process argument about the denial at his second trial of the identical *Miranda* motion the court granted at his first trial.

HARRIS, J., Concurring and Dissenting.

On Monday, May 7, 2001, 17-year-old Yvette Contreras was killed by a shotgun blast to her face. In January 2003, appellant was tried for first degree murder, but the jury was unable to reach a verdict and a mistrial was declared; the jury was divided 10-to-2 for guilt. In June 2003, appellant's second jury trial was held and resulted in his conviction for first degree murder, from which the instant appeal is taken.

I concur with the majority opinion's conclusion that the hair comparison evidence was properly admitted at trial. I also concur with the majority that appellant's statements and actions in the patrol car were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and the statements of appellant's brother, Ramon, about the shotgun were admitted in violation of *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*). I respectfully dissent, however, as to the prejudicial impact of these two errors, and would find the errors were harmless beyond a reasonable doubt given the overwhelming impact of the other direct, circumstantial, and physical evidence which was before the jury in this case.

The standard of review, as set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), "'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman, supra,* 386 U.S. at p. 24.) 'To say that an error did not contribute to the ensuing verdict is ... *to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record*.' (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the ... verdict actually rendered in *this* trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)" (*People v. Neal* (2003) 31 Cal.4th 63, 86 (*Neal*), first italics added.)

First, the physical evidence directly connected appellant with Yvette's violent death. Based on an anonymous tip, law enforcement officers recovered a bag which contained partially burned clothing, shoes, and papers. As I will discuss, *post*, appellant told his girlfriend, Rocio Macias, that he burned everything and got rid of his clothes and shoes. The criminalists who examined the contents of the bag determined that hair found among the clothes was consistent with Yvette's hair samples, used as references. In addition, there were telephone numbers written on the papers which were directly connected to Yvette—one number belonged to her grandmother, and another number belonged to a friend.

The bag also contained a pair of bloodstained blue pants. The bloodstains were identified as consistent with Yvette's blood, based on a DNA profile. The bloodstained pants had the same measurements as a pair of pants retrieved from appellant's residence, which appellant previously wore. A hair was recovered from the bloodstained blue pants. Appellant's pubic hair, used as a reference, could not be eliminated as the source of this hair.

The bag of burned clothes also contained a white tube sock. Appellant's pubic hair, used as a reference, could not be eliminated as the source of two hairs found on the white tube sock. Appellant's head hair, used as a reference, could not be eliminated as the source of one hair found on the autopsy table, presumably from Yvette's body. The jury in the first trial did not hear the evidence as to the measurements of the bloodstained pants, or the hair comparison evidence.[1]

Second, the circumstantial evidence was extremely strong in this case and placed appellant with Yvette just before she was murdered. On the fateful Monday morning of May 7, 2001, Yvette's mother answered the telephone around 9:40 a.m. and spoke to a

[1]The record indicates the prosecution requested the criminalists to conduct the hair comparison analysis *after* the first trial ended in a mistrial.

man whose voice she recognized as belonging to "Manuel." Yvette's mother had never met Manuel in person, but she recognized his voice based on his prior telephone calls to Yvette over the previous four years. Manuel frequently called the house to speak with Yvette, and Yvette referred to Manuel as her "friend." Yvette was still asleep when he called that morning, and her mother left for work at 9:45 a.m. without telling her about the call.

Around 10:00 a.m., appellant appeared at the residence of Anna Corp, his next-door-neighbor in Tulare, asked to use the telephone, and said he was waiting for a ride. Corp stated appellant used the telephone, looked out the window, and then left her house. Corp saw appellant walk toward a small white car, which was parked in front of appellant's house. Corp identified the small white car as similar to Yvette's white Hyundai Accent.[2]

As discussed *ante*, the bag of partially burned clothes also contributed to the circumstantial evidence. It contained a red shirt with lettering on it. Both Corp and her son, Bryan Urbina, stated appellant was wearing a red shirt with lettering when he asked to use their telephone that Monday morning. The bag also contained a "Puma" jersey and a pair of "Lugs" shoes. Bryan Urbina identified the "Puma" jersey as similar to one previously worn by appellant. Bryan Urbina also identified the "Lugs" shoes as similar to a pair which appellant showed him shortly before the murder. Appellant told Bryan that he just bought the shoes with his last paycheck.

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[2]The majority opinion notes that Anna Corp had difficulty with her vision. At the second trial, Anna Corp testified she could not see out of her right eye, and she had "a little bit" of vision in her left eye. She also testified she could not remember what she told the detectives about appellant's clothing and what kind of car he left in. She was impeached by her prior testimony at the first trial and her statements to a detective that appellant was wearing a red shirt with lettering when he arrived at her house to use the telephone. She also conceded appellant left in a small white car which was similar to Yvette's vehicle. She never said her vision prevented her from observing appellant's clothing or the type of car he left in.

Yvette's mother last saw her around 9:45 a.m. on Monday. Around 4:30 p.m., the fisherman found blood and bits of skull and brain matter on the canal bank, which were subsequently identified as consistent with Yvette's DNA profile. Thus, Yvette was murdered sometime between 9:45 a.m. and 4:30 p.m. on Monday, May 7, 2001.

The circumstantial evidence also placed appellant in the vicinity of Yvette's body, which was found on Wednesday, May 9, 2001, in the trunk of her small white Hyundai. The car had been abandoned on a dirt road near a residential area in Porterville. Michael M. lived in that residential area and recalled the evening that Yvette's body was found because it was a big event in the neighborhood. Michael M. testified that a few nights before Yvette's body was found, he saw a man drive a white car past his house and continue down the dirt road. It was nighttime and the driver was the only occupant. At the second trial, 16-year-old Michael M. claimed the white car was longer than a compact car, but admitted he testified at the first trial that the white car was similar to Yvette's white Hyundai.

On Monday night, May 7, 2001, appellant appeared at the Porterville residence of Luisa Andrews, his brother's girlfriend, and asked to use the telephone and spend the night. He arrived on foot and he was not carrying anything. Andrews thought appellant's presence was unusual because he arrived without his brother, but she allowed him to spend the night. Appellant stayed there until he was picked up on Tuesday by Ramon, his brother, and Rocio Macias, appellant's girlfriend. Luisa Andrews's house was just one-quarter mile away from the location on the dirt road where Yvette's car and body were found on Wednesday.

In addition to the physical and circumstantial evidence, the jury heard direct evidence of appellant's guilt through the testimony of Rocio Macias, appellant's girlfriend, who testified as a prosecution witness.[3] Yvette disappeared on Monday.

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[3]As I will explain, *post*, Rocio testified extensively at appellant's preliminary hearing and was subject to cross-examination. She refused to testify at both trials. As a result, the

Rocio testified that on Tuesday, May 8, 2001, she was interviewed by the sheriff's department about Yvette's disappearance. This interview occurred before Yvette's body and the bag of partially burned clothes were found. After her interview with the sheriff's detectives, Rocio tried to find appellant. Because she had been told that appellant was with Yvette, Rocio went to Yvette's house and asked Yvette's mother if she had seen appellant. Rocio also looked for appellant at Anna Corp's house. Rocio eventually found appellant's brother, Ramon, and they drove to Porterville on Tuesday night and picked up appellant from Luisa Andrews's house. Rocio drove back to Tulare, where they dropped Ramon at his house, and then Rocio drove appellant to a friend's house in Corcoran. Appellant spent Tuesday night in Corcoran, and was arrested at the friend's house early on Wednesday morning.

Rocio testified that during the drive to Corcoran, she told appellant about her interview with the sheriff's detectives and "what they had told me," that appellant "was a possible suspect and that [Yvette] had been missing." As Rocio testified about this conversation, she was initially hostile toward the prosecutor and somewhat equivocal as to what appellant told her. On direct examination, Rocio testified she told appellant everything the detectives told her: that the sheriff's department was looking for him, Yvette was missing, someone had been shot, and he was a suspect. Rocio testified she was angry and emotional, and started to cry because she did not know what to think or believe. Rocio kept "pushing the subject", and appellant became upset because she would not drop the subject. "I told him what the detectives told me, and he said, 'Yeah, is that what you want to hear?' And he just repeated everything back to me."

Rocio claimed she repeatedly confronted appellant with the detectives' information that "somebody had gotten shot" and Yvette was missing. "And he just said, 'Yeah, okay. Is that what you want to hear? Yeah.' He was just – everything I told him

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prosecution introduced her preliminary hearing testimony pursuant to the former testimony exception to the hearsay rule. (Evid. Code, §§ 1291, 240.)

about somebody getting shot and him being missing, he repeated everything back." Appellant yelled at Rocio to shut up because he did not know what she was talking about. Rocio again told him that someone had been shot "and he had something to do with it and that he was a suspect." Appellant replied: "'All right. Is that what you want to hear? Yeah, somebody got killed. There. Does that make you happy?' Stuff like that …." "I told him someone got shot, and he goes, 'Okay. Yeah. I shot her, yeah. Is that what you want to hear?'" Appellant never said he killed Yvette "in those words," and never said Yvette's name, but Rocio testified appellant was clearly talking about Yvette.

As her direct examination continued, however, Rocio testified she pressed appellant for "a lot of reasons" and asked if it was true. In response, appellant volunteered information about Yvette which went beyond simple repetitions of what Rocio reported about her interview with the sheriff's detectives, and said certain things which would not have been known to anyone but the killer. As her testimony continued, Rocio was still hesitant to repeat appellant's statements, but she was confronted by the transcript of her interview with the sheriff's detectives and testified to appellant's statements.

Thereafter, Rocio testified appellant "blurted out" certain things about Yvette and he said "all that at once." Appellant told Rocio that "'[s]omebody's head got shot'"; "the side of her face was blown off"; they were hanging out and messing around and he "just shot her"; Yvette "just turned around" before he shot her; "'he will never forget that face'"; he had a beer and she had a soda; just before he shot her, Yvette said "'are you going to shoot me or something?'"; that "it was a gun"; he did not have the gun on him; he left the gun back "over there" to "get cleaned" and "get rid of"; his clothes "must have got burnt"; and he got rid of everything, and he got rid of his shoes and clothes.

On cross-examination, Rocio returned to her story that appellant merely repeated what she told him. As noted in the majority opinion, Rocio testified that appellant said

"'[f]ine, whatever you say,'" and "'[i]s that what you want to hear,'" as a way to get her to shut up and "pacify" her. Also on cross-examination, Rocio testified she asked to see a priest because she felt bad that she initially lied to the detectives about "something this big."

On redirect examination, Rocio testified she did not want appellant to kill Yvette, she did not want appellant to tell her that he shot Yvette, and it did not make her happy when appellant said that her face had been blown off.

"Q Were you trying to get [appellant], to say those things to you?

"A No."

Rocio's testimony about appellant's statements is crucial because appellant revealed specific details which were consistent with the murder, and went far beyond repeating whatever Rocio had learned during her interview with the detectives. When appellant spoke to Rocio on Tuesday, he discussed how he killed Yvette and said he burned his clothes and shoes. Appellant made these statements to Rocio on Tuesday, one day before the police found Yvette's body in the trunk of her car, and recovered the bag of burned clothes which contained blood consistent with Yvette's DNA profile, and hair which could not be eliminated as coming from appellant, based on his reference samples.

The majority opinion concludes that aside from the evidence admitted in violation of *Miranda* and *Crawford*, "the other evidence of [appellant's] guilt was less compelling." The majority opinion acknowledges that appellant made "damaging admissions" to Rocio, but discounts the impact of her testimony.

> "... [Rocio's] credibility was suspect. She was Yvette's rival, so her motive to kill Yvette arguably was even stronger than [appellant's]. She pled no contest to accessory to a felony after the sheriff's office identified her as a possible suspect in Yvette's homicide. She faced a maximum of three years in state prison on the plea, but her sentence was 'still up in the air' and local time or probation was still possible. She was predisposed to maximize [appellant's] role in Yvette's murder and to minimize her own."

Rocio's testimony was not presented to the jury in a vacuum, however, and the jury was well aware of Rocio's possible involvement in this case. Rocio admitted she viewed Yvette as a rival and they did not get along. Rocio knew the detectives believed Yvette had been murdered, and that she was considered a suspect in a murder case. Appellant was arrested Wednesday morning and Rocio was arrested Wednesday afternoon, even before the bag of partially burned clothing was found on Wednesday night. The jury was also advised that at the time of her testimony, Rocio had pleaded no contest to being an accessory, her bail had been reduced, and her sentencing hearing was pending.

Rocio was clearly involved as an accessory after the fact in this case. She helped appellant evade arrest by driving him to Corcoran so he could hide there on Tuesday night, even after he confessed to her that he killed Yvette. The physical evidence, however, provides the answer as to the majority's implication that Rocio lacked credibility because she was the actual killer of Yvette. The criminalists who examined the blood and hair evidence compared it with reference samples from Yvette, appellant, and Rocio. None of the physical evidence were consistent with the reference samples from Rocio. The only blood and hair evidence identified in this case was consistent with reference samples from appellant and Yvette. While the majority asserts the circumstantial evidence might have pointed toward Rocio, none of the physical evidence implicated her as being involved in the actual murder and instead pointed to appellant as the perpetrator.

The majority opinion also casts doubt on the reliability of Rocio's testimony because of the nature by which it was presented to the jury, describing it as "the disembodied reading to the jury of her preliminary hearing testimony." As noted *ante*, Rocio testified at appellant's preliminary hearing and was subject to extensive cross-examination. At both trials, however, she refused to testify pursuant to the Fifth Amendment and was thus unavailable. (Evid. Code, § 240.) At both trials, Rocio's

preliminary hearing testimony was read to the jury pursuant to the former testimony exception to the hearsay rule. (Evid. Code, § 1291.)

The instant jury heard the complete transcript of Rocio's lengthy preliminary hearing testimony. The court advised the jury that Rocio's testimony was from a prior proceeding and she was unavailable as a witness in this case. The prosecutor and defense counsel read the questions, and another person read Rocio's responses. The jury also heard the parties' objections and the court's rulings therein, as they occurred at the preliminary hearing. Appellant requested the court to advise the jury of his original objections at the preliminary hearing, and raised additional objections to some aspects of the testimony, but did not object to the reading of the transcript and implicitly acknowledged it was admissible pursuant to the former testimony exception.

Nevertheless, the majority opinion finds the method of presentation of this testimony undermines Rocio's credibility:

> "Even if the jury somehow were to find Rocio credible, the disembodied reading to the jury of her preliminary hearing testimony showed that [appellant's] statements to her were somewhat equivocal, as she thought he was telling her things just to pacify her and to get her to shut up. The preliminary hearing transcript of her testimony betrayed not only her fear of [appellant's] and Yvette's relationship but also her longing to harm Yvette."

The majority opinion apparently views Rocio's testimony as somehow less reliable or credible simply because it was introduced pursuant to the former testimony exception to the hearsay rule. This hearsay exception, however, is well-recognized and does not violate the confrontation clause. In *Barber v. Page* (1968) 390 U.S. 719, the United States Supreme Court recognized that "there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." (*Id.* at p. 722.) The California Supreme Court has similarly recognized the "[a]dmission of the former testimony of an unavailable witness

is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions--not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 975, citing *Barber v. Page, supra,* 390 U.S. at p. 725; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 850; *People v. Alcala* (1992) 4 Cal.4th 742, 784-785; *People v. Cromer* (2001) 24 Cal.4th 889, 892; *People v. Smith* (2003) 30 Cal.4th 581, 609.) Indeed, the former testimony exception has apparently survived the impact of *Crawford*. (*Crawford, supra,* 541 U.S. at p. ____ [124 S.Ct. at pp. 1369, 1374] ["Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine"].)

The majority opinion also characterizes appellant's statements to Rocio as equivocal and intended to shut her up. As set forth *ante*, Rocio tried to claim that appellant simply repeated what she told him about her interview with the detectives. However, she ultimately admitted that appellant voluntarily revealed chilling details about Yvette's murder which went beyond equivocal statements or merely repeating what Rocio said to shut her up. These details—that he shot her in the head, and he burned his shoes and clothes—were consistent with the subsequent discovery of Yvette's body, the fatal head wound, and the bag of burned clothing, all of which were found the day after appellant confessed to Rocio.

The majority opinion finds the *Miranda* error prejudicial because it "brought before the jury -- in incomparably probative words from the accused's own mouth and motions of the accused's own body -- the only evidence that immediately after his arrest [appellant] knew not only the victim's identity but also the crime scene location."

Rocio's testimony, however, established that she told appellant that the detectives said Yvette was missing, someone had been shot, and he was a suspect. Thus, appellant's acknowledgement to the detective that he knew he had been arrested for Yvette's murder was necessarily cumulative in light of Rocio's testimony.

As for his purported gaze toward the crime scene, the detective testified appellant looked out the right front passenger window of the patrol car in the general direction of the canal bank, as the detective turned at an intersection. The murder scene, however, was in a secluded area and one mile away from their position on the road. The evidence as to appellant's glance out the window is necessarily harmless beyond a reasonable doubt when compared to the overwhelming evidence of guilt, as set forth *ante*.

The majority opinion also finds the *Crawford* error prejudicial because it "brought before the jury the only evidence that Ramon [appellant's brother] noticed the shotgun he kept in his bedroom was missing when he came home from work on the day after Yvette disappeared. Since Ramon and [appellant] lived together, the jury could readily infer [appellant] killed Yvette with the missing shotgun." But appellant's confession to Rocio established that he used a gun and disposed of it before Tuesday. It was undisputed that Yvette's fatal wounds were inflicted by a close contact shotgun blast to the front left side of her face. Neither the murder weapon nor Ramon's missing shotgun was ever found to make any ballistics comparisons to prove Ramon's gun was the murder weapon. Again, given the overwhelming impact of the other direct and circumstantial evidence of guilt, Ramon's statement about the gun is harmless beyond a reasonable doubt in light of the entire record.

Appellant asserts the trial court changed its evidentiary rulings between the first and second trials because of the occurrence of the mistrial. The record refutes this claim. As to the *Crawford* issue, the majority opinion notes that at the first trial, the court "granted [appellant's] motion in limine to prohibit the admission of Ramon's statements about the shotgun." At the first trial, however, the trial court never reached the merits of

this issue. Defense counsel moved to exclude Ramon's hearsay statements about the missing shotgun. The prosecutor explained Ramon was in custody, he had been subpoenaed, but he would probably refuse to testify. The court replied Ramon's hearsay statements were not admissible unless he testified. The prosecutor did not challenge this ruling or request a hearing on the admissibility of Ramon's hearsay statements. Instead, the prosecutor introduced substantially similar evidence to the first jury through the testimony of Lucio M., appellant's 12-year-old brother. At the first trial, Lucio testified that he remembered speaking to an officer but repeatedly claimed he could not remember saying anything about a gun. A detective then testified that Lucio said Ramon had a gun which was two feet long. This testimony was admissible as a prior inconsistent statement. (Evid. Code, § 1235.)

At the second trial, the prosecutor moved to introduce Ramon's hearsay statements about the gun. Thereafter, the trial court conducted a lengthy evidentiary hearing on this issue for the first time, and heard extensive argument as to whether Ramon was unavailable and his hearsay statements were admissible. The court excluded Ramon's hearsay statements that he suspected appellant took the gun, and that appellant was hiding in Corcoran. As set forth in the majority opinion, however, the court admitted Ramon's hearsay statement that his gun was missing, and found it constituted a declaration against his penal interest based on Ramon's admitted status as an ex-felon.

During the evidentiary hearing at the second trial, the prosecutor noted that Lucio also referred to the gun. However, the prosecutor did not attempt to introduce Lucio's statements about the gun at the second trial, and apparently decided to rely on Ramon's hearsay statements about the gun. If Lucio had been called at the second trial and again denied making such a statement, his prior inconsistent statement would have again been admissible and would not have run afoul of *Crawford*. (*Crawford*, *supra*, 541 U.S. at p. ___ [124 S.Ct. at p. 1369, fn. 9].)

In any event, the court never conducted an evidentiary hearing about Ramon's hearsay statements at the first trial, and never considered whether any of Ramon's hearsay statements to the detective were admissible for any purpose. Instead, the court only considered these issues on the merits at the second trial. In addition, the first jury heard Lucio's statements that appellant had access to a shotgun, which was similar to the evidence admitted in violation of *Crawford* in the second trial, but the first jury was still unable to reach a verdict.

Appellant similarly asserts the court improperly changed its ruling on the *Miranda* issue between the first and second trials, and that the court violated due process when it decided to admit appellant's postarrest statements. The record refutes this characterization of the record. At the first trial, the prosecutor sought to introduce appellant's postarrest statements in the patrol car. The court conducted an evidentiary hearing pursuant to Evidence Code section 402 and determined appellant's statements were obtained in violation of *Miranda*. At the beginning of the second trial, the prosecutor requested the court to reconsider the *Miranda* issue. The majority opinion quotes Judge Moran as characterizing his previous *Miranda* ruling as "ill considered." The entirety of the record places Judge Moran's comment in context:

> "I was very unhappy with that ruling. You know, I made the ruling prior to trial but then after I heard the evidence I thought it might have been ill considered. So I will put that on again.... [¶]…[¶] … Let's do that again and see if it comes out the same way."

Thereafter, the court conducted another evidentiary hearing and concluded appellant's statements were not obtained in violation of *Miranda*.

I concur with the majority opinion's conclusion that appellant's statements were obtained in violation of *Miranda* and Judge Moran should have excluded this evidence. However, I reject appellant's due process argument that Judge Moran reconsidered the *Miranda* issue to make "more evidence available to support a conviction." Judge

Moran's comments at the second trial were not indicative of any desire to change his *Miranda* ruling simply to obtain a conviction in this case.

Appellant also asserts Judge Moran's comments at the conclusion of this case were indicative of some underlying motive behind his evidentiary rulings at the second trial. Again, the record refutes this assertion. After the jury returned the conviction in this case, Judge Moran made the following comments:

> "A little bit of background on this case. It was tried once before in January of this year and there was – the jury was divided ten to two for conviction. You heard additional evidence that was not available at this earlier trial. Some of the physical evidence that you had was submitted to the Department of Justice prior to that trial, but it was never analyzed and available at the [first] trial."

Judge Moran acknowledged there had been some "colorful witnesses" and circumstantial evidence in the case, but noted the impact of the physical evidence which had not been introduced at the first trial:

> "Many years ago nearly half a century when I first was involved in the legal system as a prosecutor, I was advised that wherever possible rely on physical evidence in your case, that witnesses are mistaken, they are forgetful, and they lie.
>
> "The physical evidence never lies, never forgets and is never mistaken. So whenever I had a case such as this, I would rely heavily on the physical evidence, ballistics, fingerprints, fiber, hair analysis ... and such."

The record of the second trial indicates the prosecution requested and obtained the analysis of the hair evidence *after* the mistrial in the first trial, in an obvious effort to plug the evidentiary holes in this case. Thus, Judge Moran's postconviction comments to the jury about "additional evidence that was not available" at the first trial did not refer to the evidence admitted at the second trial in violation of *Miranda* and *Crawford*, or reveal any unspoken intent to reverse his previous rulings on these issues to obtain a conviction. Instead, he correctly noted the importance of the physical evidence in this case.

Appellant asserts the only difference between the first and second trials was the trial court's decision to admit the evidence obtained in violation of *Miranda* and *Crawford*. Appellant thus asserts the *Miranda* and *Crawford* errors are prejudicial because the first jury did not hear this evidence and could not reach a verdict, but the second jury heard this inadmissible evidence and returned the conviction. The majority opinion implies as much in its analysis of the prejudicial impact of the *Miranda* and *Crawford* errors. The record refutes these arguments. The first jury heard evidence, through Lucio's hearsay statements, that appellant had access to a shotgun. The first jury also heard, through Rocio's testimony, that appellant knew he was suspected of killing Yvette. The physical evidence was the crucial difference between the first and second trials. Indeed, the hair evidence was not introduced or even discovered in time for the first trial. The first jury did not hear that hairs found on the blue pants stained with Yvette's blood, on the tube sock in the bag of burned clothes, and recovered from the autopsy table, were consistent with appellant's reference hairs, and that none of the blood or hair was consistent with Rocio's reference samples.

While the court herein improperly admitted evidence in violation of *Miranda* and *Crawford*, I would conclude the prejudicial impact of such evidence was harmless beyond a reasonable doubt given the nature of that evidence, and because of the overwhelming weight of the other direct, circumstantial, and physical evidence of guilt in this case. I would therefore affirm appellant's conviction for first degree murder and find the errors were "'*unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record*.'" (*Neal, supra*, 31 Cal.4th at p. 86, italics added, quoting *Yates v. Evatt, supra*, 500 U.S. 391, 403.)

HARRIS, Acting P.J.